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Gift-Giving and Inheritance Strategies in Late Roman Law and Legal Practice (Fourth to Sixth Centuries CE).

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‘Much has been enacted concerning testaments by this great Roman Republic, created, as has happily been said, by God, and the books of law are full of the subject.’<sup>1</sup>

In Roman law an inheritance could be passed on according to the rules of intestate or testate succession.<sup>2</sup> In the case of intestate succession the heirs were called to the inheritance by the rules of the Roman civil law, rather than by the express intentions of the deceased.<sup>3</sup> The postclassical Roman rules for intestate succession were complex but focused upon ensuring transmission of the patrimony to the decedent's closest relatives - in most cases these would be the decedent's children, although this would be others if the decedent had died childless.<sup>4</sup> A claim for testate

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<sup>1</sup> Justinian, *Novel* 18pr. (536AD), trans. Blume.

<sup>2</sup> For a concise introduction to Roman intestate succession see T. R  fner, ‘Intestate succession in Roman law’ in *Comparative Succession Law. Volume II. Intestate Succession*, ed. K.G.C. Reid, M. J. de Waal, and R. Zimmermann (Oxford: Oxford University Press, 2015), 1-32; and for Roman testate succession see T. R  fner, ‘Testamentary formalities in Roman law,’ in *Comparative Succession Law. Volume I. Testamentary Formalities*, ed. K.G.C. Reid, M. J. de Waal, and R. Zimmermann (Oxford: Oxford University Press, 2011), 1-26.

<sup>3</sup> *Theodosian Code* (henceforth *CTh*) 4.4.5pr., given at Constantinople in 416AD, refers to intestate succession as ‘being called to the inheritance by law’.

<sup>4</sup> From 178AD, the children of an intestate woman who died *sui iuris* (‘in her own power’) were granted a claim to her goods (the *bona materna*), even if they were still in the power of their father. See R  fner, ‘Intestate succession in Roman law,’ 20-21 and 23-25.

succession, on the other hand, could only be made if it was in accordance with a decedent's express intention, whether that intention had been made known via a written document (a duly-witnessed will, a codicil or even letter) or through some unwritten means.<sup>5</sup> In Classical and Postclassical Roman law alike, the fundamental act of the testator was the institution of the heir(s). According to Roman law, the heir(s) succeeded 'into the position' of the decedent, acquiring the deceased's assets and rights in addition to any obligations which survived death, including debts owed.<sup>6</sup> There was no obligation under Roman law to appoint a family relative (close or otherwise) as a testate heir. If patrimonial debts were expected to outweigh assets then disinheriting the children and appointing someone else as heir was one strategy used by testators in order to free their children from 'the burdens which heirship imposed'.<sup>7</sup> The fact that Roman law allowed inheritances to pass outside the family created a highly complicated set of legal rules and remedies. Even intestate succession could lead to property being transmitted outside the family, as in those cases where 'trusts' (*fideicommissa*) were charged on intestate heirs in favour of extraneous beneficiaries.<sup>8</sup> As David Johnston states: 'Roman society was one in which the wide

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<sup>5</sup> On oral or 'nuncupative' wills see *Justinianic Code* (henceforth *CI*) 6.11.2.1 (242AD) and *CI* 6.23.21.4 = *Novels of Theodosius II* (henceforth *NTh*) 16.6 (439AD). For a detailed overview of the relevant Roman imperial legislation see P. Voci, *Diritto ereditario romano*, volume II, 2nd edition (Milan: Giuffrè editore, 1963), P. Voci, "Il diritto ereditario romano nell'età del tardo impero. I. Le costituzioni del IV secolo," *Iura* 29 (1978): 17-113, and P. Voci, "Il diritto ereditario romano nell'età del tardo impero. II. Le costituzioni del V secolo, seconda parte," in *Studi in onore di Cesare Sanfilippo* volume II (Milan: Università di Catania, 1982), 655-735.

<sup>6</sup> D. Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999), 45.

<sup>7</sup> Ibid., see also E. Champlin, *Final Judgments: Duty and Emotion in Roman Wills, 200 B.C. - A.D. 250* (Berkeley: University of California Press, 1991), 108-110.

<sup>8</sup> Johnston, *Roman Law in Context*, 49, citing *Digest* 29.7.81.1 (Paul). On the historical development of *fideicommissa* see D. Johnston, *The Roman Law of Trust* (Oxford: Clarendon Press, 1988) and J.C. Tate, "Codification of late Roman inheritance law: *fideicommissa* and the Theodosian Code," *Tijdschrift voor Rechtsgeschiedenis* 76 (2008): 237-248.

dispersion of property on death was common; in this way a society in which during a lifetime much was achieved by friendship and patronage finally paid its obligations'.<sup>9</sup>

Peter Brown has recently argued that social attitudes towards wealth ownership and possession changed and developed in the fourth and fifth centuries AD, focusing in particular on Christian gift-giving as a strategy that spanned both this life and the next.<sup>10</sup> In the case of Christian gift-giving - whether we are thinking in terms of low-level, regular, alms-giving or the more dramatic transfers of wealth made by members of the later fourth- and fifth-century senatorial elite - 'what differed most of all was the emphasis on the supernatural efficacy of the Christian gift'.<sup>11</sup> Christian gift-giving in Late Antiquity did not just link the living with the living and - in the case of gifts in contemplation of death and testamentary bequests - the living with the dead; it was an expression of trust in Christ's promise of eternal salvation. As Catharina Andersson puts it with reference to later mediaeval Europe: 'Gifts to the church and religious houses were one of the clearest manifestations of the relationship between the individual and God in the Middle Ages. All over Europe, gifts and donations were a natural part of how faith was expressed'.<sup>12</sup> In the later Roman period, Christian gifts, legacies and inheritances may have been differentiated from non-

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<sup>9</sup> Johnston, *The Roman Law of Trust*, 5.

<sup>10</sup> P. Brown, *The Ransom of the Soul. Afterlife and Wealth in Early Western Christianity* (Cambridge Mass.: Harvard University Press, 2015) and P. Brown, *Through the Eye of a Needle: Wealth, the Fall of Rome, and the Making of Christianity in the West, 350-550 AD* (Princeton N.J: Princeton University Press, 2012). See also the important essays by J. Harries, "'Treasure in Heaven': Property and Influence among Senators of Late Rome," in *Marriage and Property*, ed. E.M. Craik (Aberdeen: Aberdeen University Press, 1991), 54-70, K. Cooper, "Poverty, obligation, and inheritance: Roman heiresses and the varieties of senatorial Christianity in fifth-century Rome," in *Religion, Dynasty and Patronage in Early Christian Rome 300-900*, ed. K. Cooper and J. Hillner (Cambridge: Cambridge University Press, 2007), 165-189, and J. Hillner, "Families, patronage, and the titular churches of Rome, c.300 - c.600," in *Religion, Dynasty and Patronage in Early Christian Rome 300-900*, ed. K. Cooper and J. Hillner (Cambridge: Cambridge University Press, 2007), 225-261.

<sup>11</sup> Brown, *Through the Eye of a Needle*, 83.

<sup>12</sup> C. Andersson, "Gifts and society in fourteenth century Sweden," in *Disputing Strategies in Medieval Scandinavia*, ed. K. Esmark, L. Hermanson, H.J. Orning, and H. Vogt (Leiden and Boston: Brill, 2013), 219-246. 219.

Christian bequests by their 'supernatural efficacy', but the socio-legal structures that governed their operation remained very much part of the here and now.<sup>13</sup> A fundamental part of the story of the rise of 'the Christian gift' thus lies precisely in the fact that the Roman law of succession '...did not prescribe or allow just one pattern of behaviour, but presented an array of instruments and rules that permitted testators to pursue an almost infinite variety of goals'.<sup>14</sup> The Late Antique development of new instruments and rules relating to the Christian gift took place within a pre-existing legal framework, a legal framework in which - as noted above - 'the wide dispersion of property on death was common'. As we shall see, this legal framework was used and manipulated by heirs and other beneficiaries, as much as by testators and donors themselves.

The Roman law of succession, as Fritz Schulz stated, presents us with an enormous display of legal ingenuity.<sup>15</sup> In this essay I will analyse some of the legal instruments and rules by which Late Roman testators and donors (fourth to sixth centuries AD) were able to pursue a new set of goals: making over bequests and inheritances to the institutional Christian church. In Section I we begin with an overview of Roman family law and inheritance structures, paying particular attention to postclassical legal developments. In Section II we move on to explore donation and inheritance law in the specific context of the institutional Christian church from the age of Constantine onwards. Section III expands on this analysis via a focus on specific examples of strategic behaviour relating to Christian gift-giving and inheritance in the later fourth, fifth and sixth centuries AD. My argument throughout

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<sup>13</sup> On the fundamental distinction in Roman law between inheritance and bequests of legacies see Johnston, *Roman Law in Context*, 45-47.

<sup>14</sup> R.P. Saller, "Roman Heirship Strategies in Principle and in Practice," in *The Family in Italy: From Antiquity to the Present*, ed. R. P. Saller and I. Kertzer (New Haven: Yale University Press, 1991a), 26-47. 29.

<sup>15</sup> F. Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951), 203.

is that the institutional Christian church in Late Antiquity did not so much disrupt traditional Roman inheritance strategies, as take advantage of them.<sup>16</sup>

### 1. Roman family law and inheritance structures.

The Roman law of succession is interconnected with Roman family law in the sense that ‘... the overriding concern of Roman family law is not with setting standards for a family’s life and internal governance but rather with the implications of family structure for the holding and disposition of property’.<sup>17</sup> According to Roman civil law power lay with the senior male ascendant, the *pater familias*. All descendants related to the *pater familias* through the agnatic (male) line were subject to *patria potestas*, ‘paternal power’. The second-century AD jurist Gaius famously claimed that *patria potestas* was ‘unique to Roman citizens, for virtually no other peoples have power over their children that is as great as ours...’.<sup>18</sup> The *pater familias* owned all family property, hence anything acquired by those under *patria potestas* accrued to him - although various legal mechanisms were developed in order to mitigate this fact.<sup>19</sup> Children and other descendants who were subject to *patria potestas* could be formally released from that power through emancipation or by the

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<sup>16</sup> Contra J. Goody, *The Development of Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983). On Goody’s broader argument concerning the Late Antique Christian Church and changes to legal rules relating to inheritance strategies see the fundamental critique of R.P. Saller, “European family history and Roman law,” *Continuity and Change* 6.3 (1991b): 335-346.

<sup>17</sup> B. Frier and T. McGinn, *A Casebook on Roman Family Law* (Oxford: Oxford University Press, 2004), 4.

<sup>18</sup> Gaius, *Institutes*, 1.55.

<sup>19</sup> The *peculium* was originally a limited amount of capital granted by a *pater familias* to a son-in-power (a *filius familias*) or by a master to a slave. Under the early Empire, the term *peculium castrense* referred to anything that a *filius familias* had earned or acquired for himself from military service; under the Later Empire, this was extended to anything earned or acquired as a public official, as an advocate, or as an orthodox Christian cleric (*peculium quasi castrense*). On the *peculium quasi castrense* and Christian clerics see *CI* 1.3.33 (given at Constantinople, 472AD) and *CI* 1.3.49 (given at Constantinople, 531AD).

death of the *pater familias* himself.<sup>20</sup> Slaves were property and as such were not freed automatically on the death of the *pater familias*, but could be expressly manumitted during his lifetime or in accordance with his last wishes.<sup>21</sup>

An example of the complex interrelationship between Roman family law and the law of succession can be seen clearly in the Roman law prohibition on (significant) gifts between spouses. Under the Roman Republic two types of 'legal marriage' - as opposed to concubinage- were recognized: *cum manu*, where a wife was transferred into the power of a new *pater familias* (either her husband himself or the senior male head of his *familia*) and *sine manu* (where a wife would remain in the power of her own *pater familias*). By the late Republic marriage *sine manu* had become the norm. The shift from marriage *cum manu* to marriage *sine manu* entailed a corresponding shift from a 'merged' to a 'separate' regime of spousal property.<sup>22</sup> Thus gifts between spouses would have resulted in the transfer of wealth from one family-unit to another. As the Severan jurist Paul states, the fact that spouses are not to exchange gifts '... should not be interpreted as if they do not love each other and are hostile, but as between people united by the greatest affection and merely afraid of poverty (*inopia*)'.<sup>23</sup> Until Justinian's reforms of 537 and 542 AD, surviving spouses were only entitled to claim succession on intestacy if their deceased partner left

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<sup>20</sup> On patria potestas see J.A. Crook, "Patria Potestas," *Classical Quarterly* 17 (1967): 113-22. Champlin commenting on a series of papers on Roman demography by Richard Saller and Keith Hopkins, suggests that '...roughly 50 percent of Roman males who reached 14 (and legal maturity) were already sui iuris and thus capable of making a will'. Champlin, *Final Judgments*, 105.

<sup>21</sup> On slaves as property and part of a patrimony see *CI* 6.38.5 (given at Constantinople, 532AD).

<sup>22</sup> S. Dixon, *The Roman Family*, (Baltimore: John Hopkins University Press, 1992), 74.

<sup>23</sup> *Digest* 24.1.28.2, Paul. Constantine maintained the basic Roman principles, but overhauled the legal procedures relating to donations. For further discussion see C. Dupont, "Les Donations dans les constitutions de Constantin," *Revue Internationale des droits de l'antiquité* 9 (1962): 291-324.

behind no surviving blood relatives.<sup>24</sup> Wives could be instituted as (extraneous) heirs or co-heirs to testaments. They could also be left legacies and fideicommissa, including those which made provision for the return of their dowry.<sup>25</sup> As should already be apparent, Roman legal experts and imperial legislators elaborated a complex set of rules concerning intestate and testate succession. I will turn briefly now to each in turn, before moving on to explore the specific development of late Roman legal rules concerned exclusively with 'the Christian gift' in Part III below.

‘Intestate succession is a succession in which the beneficiaries are determined not by the deceased but by the residual rules of civil law; it is for this reason that the intestate heirs are known as *legitimi*, since they succeed by the authority of law (*lex*) rather than at a testator’s whim.’<sup>26</sup> Roman rules for intestate succession effectively operated as a set of default rules which only came into operation when an individual either failed to leave a will, or when the will that had been left failed.<sup>27</sup> The Urban Praetor at Rome, alongside other magistrates, provided a complex set of remedies and actions that could be pursued by disappointed parties in the event of intestate succession. By the end of the second century AD, however, the priority of claims normally went first to the *sui heredes* (those who became *sui iuris* on the death of the *pater familias*; then to those connected to the deceased by legitimate descent from a common ancestor through the male line (agnates); then to cognatic relations; only then, as noted above, was the surviving spouse to be considered. If none of these classes of persons came forward then the inheritance fell to the Imperial fisc. It is

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<sup>24</sup> *Novel* 53 and *Novel* 117. Both of these constitutions were included in the medieval (Latin) collection of Justinian's *Novels* known as the *Authenticum* (Rüfner, 2015: 29). On testate succession between spouses see Valentinian III *Novel*, 21.1.1 (posted at Rome, 446 AD).

<sup>25</sup> Champlin, *Final Judgments*, 116-124.

<sup>26</sup> Johnston, *The Roman Law of Trust*, 117.

<sup>27</sup> The emperor Justinian made important revisions to the rules concerning intestate succession in his *Novels* 118 (543AD) and 127 (548).

worth stressing here again that, according to Classical and Postclassical Roman law, even an intestate heir could be charged with a fideicommissary 'trust'. Hence despite the fact that the rules for intestate succession only provided for degrees of family relations, an intestate inheritance could nonetheless be transferred outside the family if that was the (deceased) donor's stated intention.

Any Roman citizen with full legal capacity could make a will.<sup>28</sup> As David Johnston states: 'A testator's only necessary act in making a will was to appoint an heir... The heir did not simply acquire the property of the deceased: he succeeded him as a person, and so was entitled to benefit from and was bound by (almost) all obligations in favour of or against the deceased. He was heir, moreover, for good: *semel heres semper heres*'.<sup>29</sup> Later Roman law had a number of formal requirements in order for a will to be considered valid, including that it had to have been duly witnessed or deposited in the archive of a municipality or an imperial bureaucratic archive.<sup>30</sup> In 446 the Western Emperor Valentinian III confirmed the validity of 'holographic wills': wills written entirely in the testator's own hand which did not have to be witnessed, signed or sealed,<sup>31</sup> but this constitution was not included in Justinian's *Codex* nor was it confirmed by any of Justinian's subsequent *Novellae*.<sup>32</sup> The requirement that an heir had to be instituted at the beginning of the testament - before any other kinds of testamentary provisions were made, such as legacies (*legata*), 'trusts' (*fideicommissa*), the appointment of tutors, the manumission of slaves,

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<sup>28</sup> Legal capacity, if lacking, could in many cases be supplemented by a *tutor* or *curator* (according to the Roman rules for guardianship and curatorship).

<sup>29</sup> Johnston, *The Roman Law of Trust*, 2-3.

<sup>30</sup> On the deposition of a testament in public archives (a *testamentum apud acta conditum*) see P. Voci, "Il diritto ereditario romano nell'età del tardo impero", 11-13.

<sup>31</sup> Valentinian III *Novel* 21.2, given at Rome 446 AD.

<sup>32</sup> *CTh* 2.24.1 (Constantine to the Urban Prefect Verinus given 321AD, amended to 324AD by Seeck) only permitted incomplete or otherwise legally deficient testimonies to stand if they instituted the *sui heredes* as heirs.



or the disinheritance of close relatives - seems to have been relaxed during the postclassical period and was formally abolished by Justinian.<sup>33</sup> Until the age of Justinian, however, the legal validity of any legacies left by the testator remained dependent on the heir(s) being instituted, as it was the heir(s) who had to execute the legacies. The wording of legacies also had to comply with a set of formal requirements, corresponding to different formal types of bequests.<sup>34</sup> As we shall see, 'trusts' (*fideicommissa*) offered testators more flexibility; a 'trust' could be made over to any beneficiary under a will, asking him or her to transfer (almost) all or part of what they had received under the testament to a third person or institution. For example, the 381AD testament of the Cappadocian bishop Gregory of Nazianzus names as sole heir a deacon and monk who had formerly been owned by Gregory's family as a slave and entrusts him with transferring the bulk of the estate to the Church of Nazianzus, alongside bequeathing various gifts and legacies to specific named individuals.<sup>35</sup> *Fideicommissa* did not necessarily have to be mentioned in the will itself. They could be executed by letter or codicil, by spoken word, or even through a non-verbal gesture.<sup>36</sup> In sum, in the case of testamentary succession, property could effectively be left to (almost) anyone the testator wanted provided that a basic set of formal requirements was complied with.

Under the early and late Empire close descendants (or ascendants) who could demonstrate that they had been left less than a quarter of the share that they would

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<sup>33</sup> *Pauli Sententiae* 3.6.2; CI 6.23.24, given at Constantinople, 528 AD.

<sup>34</sup> Justinianic reforms to these requirements: CI 6.43.1.1 (529 AD) and CI 6.43.2.1 (531 AD).

<sup>35</sup> Gregory's testament is the earliest Roman testament to survive in full. Champlin, *Final Judgments*, 29. See J. Beaucamp, trans. and ed., "Le Testament de Grégoire de Nazianze," in *Fontes Minores X: Forschungen zur byzantinischen Rechtsgeschichte*, ed. L. Burgmann (Frankfurt am Main: Löwenklau, 1998), 1-100..

<sup>36</sup> Postclassical wills could also include a clause to the effect that if the will failed to be valid under civil or praetorian law then it should be 'as with codicils or trusts under intestacy'. For a late (Visigothic) example see S. Corcoran, "The donation and will of Vincent of Huesca: Latin text and English translation," *Antiquité Tardive* 11 (2003): 215-221.

have received if the testator had died intestate could pursue a *querela inofficiosi testamenti*: a complaint against an 'undutiful' will.<sup>37</sup> As Zimmerman notes: 'The key issue, in this respect, was whether the will was undutiful in the sense of failing to show at least a minimum amount of consideration for the deceased's closest relatives'.<sup>38</sup> If the close relative(s) (usually children) had been formally disinherited and the grounds for that disinheritance were upheld during the *querela* then the close relative(s) received nothing. Close relatives who had not been disinherited with good reason could expect to be left what came to be referred to as the 'Falcidian share' or the 'legitimate portion': 'a quarter of the prospective intestate share'.<sup>39</sup> This was a quarter share to all the close relatives in total and unequal divisions of estates were relatively common.<sup>40</sup> If a complaint against an undutiful will was upheld by the courts, then the will (usually) failed, and hence the estate would be transmitted according to the rules for intestate succession. Roman law thus protected close relatives who had been 'undutifully' overlooked by granting them a procedural remedy in order to contest the testator's will.<sup>41</sup> Again, as David Johnston explains: 'the availability of trusts on intestacy made it possible to bypass the requirements of the *querela* (light

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<sup>37</sup> For further discussion see the paper by Charles Reid in this volume.

<sup>38</sup> R. Zimmermann, "Compulsory heirship in Roman Law," in *Exploring the Law of Succession. Studies National, Historical and Comparative*, ed. K.G.C. Reid, M. J. de Waal, and R. Zimmermann (Edinburgh: Edinburgh University Press, 2007), 27-48. 28.

<sup>39</sup> Johnston, *The Roman Law of Trust*, 4. The term 'falcidian share' looks back to the *lex Falcidia*, a Republican statute passed in 40BC. The *lex Falcidia*, however, originally addressed a rather different problem of legacies that depleted a testate heir's inheritance to such an extent that it was no longer worth the heir's trouble to accept the inheritance. The *lex Falcidia* accordingly '...required that the heirs should retain at least a quarter of the net estate' Johnston, *The Roman Law of Trust*, 5. This technical meaning also appears in Justinianic constitutions, for example *CI* 1.3.48 (given at Constantinople, 531AD) and Justinian, *Novel* 1.2 and *Novel* 119.11 (544AD).

<sup>40</sup> For example, if a *pater familias* had two children he could bequeath a fifth of the estate to one and a twentieth of the estate to another and thus fulfill the requirement of the 'falcidian share'.

<sup>41</sup> Constantine extended this remedy to mothers: 'just as a legitimate child omitted as heir from a parent's will could challenge that will as 'undutiful', so too a mother should be granted the right to proceed against her son's testament on the same grounds' (*CTh* 2.19.2 = *CI* 3.28.28, given at Serdica 321AD).

though those were) and dispose of property without restriction'.<sup>42</sup> The important point for us to note in relation to the postclassical 'legitimate portion', however, is the more basic fact that a testator was free - if they wished - to distribute at least three quarters of his or her estate away from close relatives.<sup>43</sup>

Alongside protecting the interests of close relatives, some late Roman imperial constitutions also exhibit a marked anxiety concerning the tight-knit cohesiveness of family units. *CTh* 8.12.5 (given at Constantinople, 333AD) sums up the problem: '...since indeed in the case of secret and domestic frauds anything one pleases can easily be devised, taking advantage of the opportunity of a situation, or that which has been done can be destroyed'.<sup>44</sup> For example, an imperial constitution issued three years later states that senators and those who hold various high-ranking provincial and municipal dignities are known to be treating illegitimate children as 'legitimate' - either by simply acting as if these children were legitimate (by designating them as 'legitimate' heirs in their wills and by donating gifts to them *as if* they were legitimate), or by petitioning the emperor for personal *beneficia* (privileges or exemptions) which would legalize the relevant property transactions and by implication the children themselves.<sup>45</sup> The drafter of this 336AD constitution was also aware that powerful high-ranking men were attempting to circumvent the spirit of the emperor's legislation by using specific legal mechanisms and dodges. These included naming a third party as a 'legitimate' heir, who was then to pass the property on to its 'illegitimate' intended

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<sup>42</sup> Johnston, *The Roman Law of Trust*, 280.

<sup>43</sup> In 536AD Justinian raised the 'legitimate portion' owed to children (Justinian *Novel* 18.1), having previously raised it for sons of curials or daughters married to curials (Justinian *Novel* 18.2). In a 542AD constitution Justinian also ruled that no close relative could pass over or disinherit a descendant or ascendant except on explicit grounds detailed by Justinian himself (*Novel* 115.3-5).

<sup>44</sup> '...si quidem clandestinis ac domesticis fraudibus facile quidvis pro negotii opportunitate confingi potest vel id quod gestum est aboleri.'

<sup>45</sup> *CTh* 4.6.3.

beneficiary,<sup>46</sup> or having other family members swear oaths and pacts that they would not challenge a will in which the illegitimate children were instituted as heirs.<sup>47</sup>

A 317AD constitution, issued by Constantine to the fiscal officials of Spain, had already attempted to tackle the specific problem of inheritances being transferred by secret 'trusts' (*fideicommissa*): namely, trusts set up to circumvent the law by transferring property via a third party to a beneficiary who was forbidden to take it by the law.<sup>48</sup> According to this text, anyone who had been charged with such a trust should immediately inform the imperial officials, produce the records (*gesta*) and repudiate the deed; as an incentive, those who informed against themselves in this way would receive a third of the deceased's entire estate.<sup>49</sup> Thus a trustee could benefit significantly by reporting any property that had been left, by trust, to a beneficiary who was not entitled by law to take it. We will return to this point in Sections II and III below. The fact that late Roman imperial constitutions explicitly prohibited 'secret trusts', alongside other dodges, is an important reminder of how legislative enactments can, in some cases, relate directly to social practice. Late Roman emperors, like their predecessors, worked within a system of private law that was, at base, founded on remedies: on finding legal solutions to disputes and case-specific problems. The elite, those with the most to lose, also had the most to gain from attempting to work the civil law to their own specific advantages, thus prompting - in turn - new Imperial legislation.

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<sup>46</sup> *CTh* 4.6.3.2.

<sup>47</sup> *CTh* 4.6.3.3. Contrast Justinian *Novel* 74, praef., referring to a situation where illegitimate children '...did not want to be legitimized because their father would then have controlled their maternal inheritance'. For further discussion see A. Arjava, "Paternal Power in Late Antiquity," *Journal of Roman Studies* 88 (1998): 147-165. 160.

<sup>48</sup> *CTh* 10.11.1 = *CI* 10.13.1.

<sup>49</sup> 'Is, cuius tacitae fidei commissa fuerit hereditas, statim officio gravitatis tuae nuntiet et gesta prodat et continuo quod actum fuerit renuntiet, et post hanc fidem tertiam ab omnibus defuncti bonis percipiat portionem.' (The constitution goes on to discuss the specific case where a wife is the intended beneficiary of a secret trust.)

## II. Gift-giving, inheritance and the institutional Christian church.

‘A man in the crowd said to him [Christ], Master, tell my brother to give me a share of our inheritance. 'My friend' , he replied, ‘who appointed me your judge, or the arbitrator of your claims?’<sup>50</sup>

According to the Gospel of Luke, Christ refused to involve himself in inheritance disputes. During the first three centuries AD there is extra-legal evidence for gifts, legacies, trusts and inheritances being left to Christian clerics and churches, but the first direct and explicit mention of this practice in a Roman legal text occurs in a Constantinian constitution from 321AD. The relevant excerpted text in the *Theodosian Code* reads in its entirety:

‘Let every dying person have the freedom to leave what goods he wishes to the most holy and venerable Catholic council. Let the judgements [sc. final judgements?] not fail. There is nothing which is owed more to men, than that the expression of their last choice, after which they cannot wish for another thing, be free and that their power of choice, which will not return again, be unrestrained’.<sup>51</sup>

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<sup>50</sup> *Gospel of Luke*, 12.13-15, trans. *Jerusalem Bible*.

<sup>51</sup> *CTh* 16.2.4 = *CI* 1.2.1, posted at Rome in 321AD and addressed 'to the people'. ‘Habeat unusquisque licentiam sanctissimo catholicae uenerabilique concilio decedens bonorum quod optauit relinquere. Non sint cassa iudicia. Nihil est, quod magis hominibus debetur, quam ut supremae uoluntatis, post quam aliud iam uelle non possunt, liber sit stilus et licens, quod iterum non redit, arbitrium.’

We will look first at what this excerpted text from the *Theodosian Code* (issued in 438 AD) does say and then try to piece together what it does not: namely, the original 321 AD background and possible context.<sup>52</sup> Why did Constantine issue this constitution and what can it tell us about inheritance strategies and disputes in the early fourth century AD?

As it stands, *CTh* 16.2.4 confirms that a dying person can leave what he wishes of his property to the 'most holy and venerable Catholic council'. The legislator's specific concern here is that the 'judgements', the 'power of choice', of individuals on their deathbeds should not be ineffectual. The constitution thus presupposes that the deathbed judgements themselves are firm. The question here does not concern doubt over the dying individual's intent.<sup>53</sup> Rather the doubt seems to have arisen because of the way in which that intent had been expressed. In other words, the issue seems to be with the verbal formulation 'the most holy and venerable Catholic council'. The 311AD *Edict of Galerius* and the 313AD *Letter of Licinius* (the so-called 'Edict of Milan'), both written in the aftermath of the Tetrarchic anti-Christian persecutions, refer to Christian communities as *conventicula* and *ecclesia* (assemblies, places of assembly).<sup>54</sup> In the 313AD letter of Licinius, moreover, property that had been confiscated during the persecutions is to be restored either to individual (named) Christians or to the holy Christian *corpus* ('body'), which the text glosses with the phrase *id est ecclesia* ('that is the church'). There is no mention of *concilium* as a generic term denoting 'the' or 'a' Christian community. Is this the

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<sup>52</sup> Seeck suggested that this extract was part of a much broader imperial constitution (issued on 31 January 320), which may have included the texts extracted at *CTh* 3.2.1; 4.12.3; 8.16.1; 9.7.3 and *CI* 6.9.9; 6.23.15 and 6.37.21.

<sup>53</sup> On Constantine prioritising the intent of a testator over verbal formulations see Eusebius, *Life of Constantine*, 4.26

<sup>54</sup> Lactantius, *On the Deaths of the Persecutors*, 34 -35 (Galerius) and 48 (Licinius), quoted in Latin; Eusebius, *Ecclesiastical History* 8.17 (Galerius) and 10.5 (Licinius), in Greek translations from Latin.

problem that originally lay behind our 321AD enactment? According to T.D. Barnes the text at *CTh* 16.2.4 ‘...requires an emendation which does not seriously affect its meaning’: he inserts the word 'ecclesia' into the first sentence, to read ‘Let every person of his deathbed have the freedom to leave what he wishes of his property to the most holy council of the Catholic church’.<sup>55</sup> The fact, however, that the designation *ecclesia* is missing here may in fact be the very point of this constitution, at least in its original 321AD context. Was the verbal formulation 'the most holy and venerable Catholic council' a legally valid one, in terms of designating an heir or the beneficiary of a legacy or *fideicommissum*? Constantine's answer was yes.

This suggestion of a possible context for Constantine's 321 AD constitution opens up a further set of questions concerning what may have motivated the issuing of the text in the first place. There are a number of plausible scenarios, one of which is that the original text was prompted by a specific case or concrete legal problem. For example, a dying person made a will, left a legacy, or entrusted a *fideicommissum* (the extant text - as it stands at *CTh* 16.2.4 - allows for all these possibilities) with the 'most holy and venerable Catholic council' as an heir or some other kind of beneficiary. The last wishes of this dying person were subsequently challenged, perhaps by close relatives of the deceased or by creditors to the estate, on the grounds of the wording: 'the most holy and venerable Catholic council'. In order for an individual or an institution, such as a municipality, to be instituted as an heir, or to receive a legacy lawfully, they had to have testamentary capacity.<sup>56</sup> Did the 'most holy and venerable Catholic council' have testamentary capacity? We could, for example, envisage a situation where close relatives of the deceased had refused to hand over property that

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<sup>55</sup> T. Barnes, *Constantine: Dynasty, Religion and Power in the Later Roman Empire*, (Chichester: Wiley-Blackwell, 2011), 139-140.

<sup>56</sup> D. Johnston, "Munificence and Municipia: Bequests to Towns in Classical Roman Law," *Journal of Roman Studies* 75 (1985): 105-125.

had been bequeathed to the 'most holy and venerable Catholic council'. It would then be left up to ecclesiastical officials to attempt to claim the inheritance or bequest via the imperial courts. In the specific case of a *fideicommissum* if there was uncertainty or doubt in the mind of any individual who had been charged with transferring property to 'the most holy and venerable Catholic council' then they may have been prompted to report the bequest to the imperial authorities themselves, under the rules for 'secret trusts' laid down by Constantine four years earlier.<sup>57</sup> Under each of these scenarios, Constantine promulgated his 321AD constitution in order to clear up any confusion: every dying person has '... the freedom to leave whatever goods he wishes to the most holy and venerable Catholic council'.<sup>58</sup> Constantine's 321AD constitution thus does not simply confirm the validity of inheritances and deathbed gifts left to the Catholic Church, it is also evidence for the legal complexities and potential challenges that such bequests could entail.

Bequeathing property to the institutional church - whether in the form of gifts transferred between the living (*donatio inter vivos*), gifts made in contemplation of death (*donatio mortis causa*) or property left by testamentary bequests and inheritances - is a recurring topos in fifth- and sixth-century biographies of those elite senatorial Christians who disinherited themselves 'in order to achieve their

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<sup>57</sup> *CTh* 10.11.1. Discussed in section I above. Compare H. Vogt, "The power to judge: Jurisdiction in property conflicts in thirteenth-century Denmark," in *Disputing Strategies in Medieval Scandinavia*, ed. K. Esmark, L. Hermanson, H.J. Orning, and H. Vogt (Leiden and Boston: Brill, 2013), 161-180.170 on donations, both *inter vivos* and *mortis causa*, as the grounds for dispute in over a third of property conflicts known from the thirteenth-century Kingdom of Denmark and duchy of Schleswig. On medieval donations more generally see W. Davies, ed., *The Languages of Gift in the Early Middle Ages* (Cambridge: Cambridge University Press, 2010).

<sup>58</sup> In either 320 or 326 Constantine legislated to clear up further confusions surrounding legacies and trusts (*CI* 6.23.15, *CI* 6.37.21 and *CI* 6.9.9, originally from the same constitution). Further discussion at Johnston, *The Roman Law of Trust*, 213.



inheritance in heaven'.<sup>59</sup> As Elizabeth Clark states: 'The examples of Olympias, of Melania the Younger, and of Demetrias suggest that once the female ascetic could counter the laws forbidding the 'under-aged' (i.e., those under twenty-five) to disperse family property without a special exemption, or laws allowing relatives to declare them prodigal or demented, they were free to dispense vast amounts of money and property as they chose - in these cases, to the church, to Christian charities, and to ascetic programs'.<sup>60</sup> Anicia Faltonia Proba (d.432AD), the elite daughter, wife and 'mother of consuls', apparently made over the income of her estates in Asia to support the Christian clergy, the poor and the monasteries.<sup>61</sup> The *Passio SS. Alexandri, Eventii et Theodoli martyrum*, a sixth- or early seventh-century Roman '*gesta martyrum*', portrays the reverse scenario of a (second-century) *vir illustris* and urban prefect donating his wife's *patrimonium* - alongside some of his own property - to the Bishop of Rome.<sup>62</sup> Such examples, as Elizabeth Clark and Jill Harries have argued, showcase the 'antifamilial tendencies' of Late Roman ascetic discourse.<sup>63</sup> In order to store up treasure in heaven, patrimonies have to be given away to the institutional Church or to pious causes. This radical ideology of renunciation is a striking feature of late antique Christian ascetic discourse, but to focus primarily on the ideology itself risks masking a fundamental fact. Roman inheritance law permitted the bulk of a patrimony to pass

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<sup>59</sup> As Jerome phrased it in his *Letter* 108.6, describing Paula, a later fourth-century Roman matron of high senatorial rank who distributed all her wealth to her children before departing for an ascetic life in the Holy Land. On Paula see L.L. Coon, *Sacred Fictions: Holy Women and Hagiography in Late Antiquity* (Philadelphia: University of Pennsylvania Press, 2010), 103-109.

<sup>60</sup> E.A. Clark, "Antifamilial tendencies in Ancient Christianity," *Journal of the History of Sexuality* 5.3 (1995): 356-380. 372.

<sup>61</sup> Cooper, "Poverty, obligation, and inheritance," 169. The description of Anicia Faltonia Proba is from *ILS* 1269.

<sup>62</sup> K. Sessa, "Domestic conversions: households and bishops in the late antique "papal legends,"" in *Religion, Dynasty and Patronage in Early Christian Rome 300-900*, ed. K. Cooper and J. Hillner (Cambridge: Cambridge University Press, 2007), 79-114. 101.

<sup>63</sup> Clark, "Antifamilial tendencies in Ancient Christianity" and Harries, "'Treasure in Heaven'".

outside the family and we find late Roman law itself underpinning these radical, elite, acts of wealth redistribution.<sup>64</sup>

The *Life of Melania the Younger*, originally written by Gerontius in Jerusalem in 452-453AD, carefully dramatizes the legal complexities involved in the hyper-wealthy Melania's process of ascetic conversion. Early in the *Life* the audience is told that Melania's father was thinking of disinheriting Melania and her husband Pinian and redistributing their possessions to the other children, whilst '...every one of their senatorial relatives had schemed for their goods...'.<sup>65</sup> Melania - acting through the Empress Serena - then acquires a decree from the Emperor Honorius, to be promulgated in every province, ordering that her and Pinian's property was to be liquidated through the actions of imperial governors and ministers, with the proceeds to be given to Melania and Pinian themselves.<sup>66</sup> We are later told that because of the barbarian invasions some of this property could not be sold.<sup>67</sup> Meanwhile, the Prefect of the City of Rome, together with the Roman Senate, is portrayed as deciding to confiscate Pinian's and Melania's property for the public treasury.<sup>68</sup> Once Melania has set sail from Italy she is depicted in the *Life* as a faithful donor to Christian communities and to pious causes, but she is also portrayed as a trustworthy and

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<sup>64</sup> Roman (provincial) law also underpins narratives of property donation and inheritance in late antique monastic literature. For further discussion see R.S. Bagnall, "Monks and property: rhetoric, law, and patronage in the Apophthegmata Patrum and the papyri," *Greek, Roman and Byzantine Studies* 42 (2001): 7-24 and E.R. O'Connell, "Transforming monumental landscapes in Late Antique Egypt: monastic dwellings in legal documents from Western Thebes," *Journal of Early Christian Studies* 15.2 (2007): 239-273.

<sup>65</sup> Section 12, from E.A. Clark, trans., *The Life of Melania the Younger* (New York and Toronto: Edwin Mellen Press, 1984), 36.

<sup>66</sup> Section 13.

<sup>67</sup> Section 37. In Section 19 the narrator comments: 'Everybody praised the Lord of all things, saying 'Lucky are the ones who anticipated what was to come and sold their possessions before the arrival of the barbarians!'. Ibid. 42.

<sup>68</sup> Section 19. In the narrative, this confiscation does not take place because the Prefect is lynched to death 'by God's providence', by a mob rioting over a bread shortage. Ibid. 42. Further discussion at ibid. 102-108.

scrupulous recipient of donations on behalf of others. In keeping with late Roman legislation, Melania would not accept any donations from heretics 'to give for the service of the poor'.<sup>69</sup> Those donations that Melania did accept she administered as a model intermediary:

'Not only did she offer to God that which was her own; she also helped others to do the same. Thus many of those who loved Christ furnished her with their money, since she was a faithful and wise steward. She commanded these monies to be distributed honestly and judiciously according to the request of the donor'.<sup>70</sup>

Ensuring that the wishes of donors were met - that their donations and legacies were put to the specific uses for which they were originally intended - was a longstanding legal issue.<sup>71</sup> Melania may have practiced an 'antifamilial' radical asceticism, but she is portrayed throughout her *Life* as acting in accordance with the structures and principles of late Roman law.

Late Roman Imperial legislation suggests that some families even attempted to harness the 'antifamilial tendencies' of Christian asceticism, in order to develop new forms of estate planning. As Peter Brown puts it: 'Well-to-do families had come to use the Church so as to husband their own threatened resources'.<sup>72</sup> Section 3 of *Novel* 6 of the Emperor Majorian, given at Ravenna in 458 AD, legislates against parents who have promised their daughters to perpetual virginity, instead of

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<sup>69</sup> Section 27, trans. *ibid.* 46. On the late Roman legislation barring heretics from various legal transactions see Section III below.

<sup>70</sup> Clark, *The Life of Melania the Younger*, 48.

<sup>71</sup> Justinian attempted to deal with this problem of enforcement in relation to pious donations in his *Novel* 131.10 and 12 (545AD).

<sup>72</sup> Brown, *Through the Eye of a Needle*, 439.

committing them to a marital union, either in order to avoid having to pay a dowry or to cut down on the number of children eligible for a share in the patrimonial inheritance.<sup>73</sup> Granting daughters as pious gifts to nunneries was a way of creating ‘social bonds and symbolic capital’, as Catharina Andersson has argued with reference to medieval Sweden.<sup>74</sup> It was also, however, a means of managing economic capital in the here and now.

From Constantine's 321AD enactment onwards, a complex body of imperial legislation and conciliar rulings developed concerning inheritances and gifts given and received by clerics, monks and others dedicated to a Christian ascetic life. For example, in 419AD an assembly of bishops at Carthage attempted to remove any ambiguity by deciding that a cleric who entered orders as a poor man had to place all his subsequent property acquisitions under the ownership of the church. Provisions were also made, however, for clerics to still take personal inheritances: ‘If something has come to them in a private capacity through the generosity of an individual or in family succession, then they should do with it what suits their purpose’.<sup>75</sup> The complexity of the situations that could arise in late Roman ecclesiastical and monastic settings concerning inheritance and succession can be seen in an imperial constitution issued in 434 AD. This constitution, excerpted at *CTh* 5.3.1 and *CI* 1.3.20, lays down what ought to happen to the property of ‘a bishop, priest, deacon, deaconess, sub-deacon or cleric of another rank, or some monk, or some woman who is consecrated to the solitary life’ if they die intestate. If there were no surviving close relatives or a spouse then the goods were to go to the church or monastery to which the deceased had been dedicated, except in those cases where the deceased had had the status of a

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<sup>73</sup> Compare Justinian *Novel* 123.37 (546AD).

<sup>74</sup> Andersson, “Gifts and society in fourteenth century Sweden.”

<sup>75</sup> *Canones in Causa Apiani*, 32 = CCL 149, 144.

*colonus* (an individual ascribed on the tax list of a specific estate), a curial, or a freedman: it is not right, the emperors state, that the churches should hold the goods that are owed by law to the proprietor of an estate, or to the municipal councils or to a patron. The constitution also explicitly affirms the individual churches' right of action to pursue said proprietors of estates, municipal councils and patrons, if it turns out that the deceased cleric, monk or ascetic died whilst obligated by business transactions, or any other acts, relating to that church. The 434AD constitution ends by stating that any lawsuits arising from petitions for the property of intestate clerics, monks etc. which are pending in the courts shall be stopped and that henceforth no (extraneous) claimant is allowed to enter court and annoy the church stewards, the monks or the procurators, since the law is now clear.<sup>76</sup> The 434AD constitution is thus a clear example of the emperors' legislating in response to complexities and difficulties thrown up by concrete legal cases concerning inheritance and succession in ecclesiastical and monastic contexts. Other later examples cover what should happen to the property of clerics and monks when they choose to enter upon those orders and what should happen to their property if they decide to leave, including the question of whether property acquired by a bishop whilst a bishop should accrue to him or to his church.<sup>77</sup>

In order to avoid intestate succession clerics and monks who had legal capacity could, of course, make testamentary dispositions (as we have already seen in the case of Gregory, Bishop of Nazianzus). A set of late fifth- and early sixth-century

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<sup>76</sup> The Visigothic interpretation to *CTh* 5.3.1 adds the explicit point that bishops and other persons designated in the law have the unrestricted right to make a will. Corcoran, "The donation and will of Vincent of Huesca" discusses a Visigothic bishop's will and a preceding act of donation made in favour of a monastery.

<sup>77</sup> *CI* 1.3.38 (undated), Justinian *Novel* 131.13 (545 AD) and Justinian *Novel* 123, 1, 3, 16, and 38-40 (546 AD). On the property of 'deaconesses' and their testamentary capacity see *CTh* 16.2.27 (given at Milan, 390 AD); *CTh* 16.8.28 (given at Verona, 390 AD); and Justinian *Novel* 123.30 (546 AD).

imperial constitutions deal with the situation where bishops, presbyters and deacons 'of the holy orthodox church' have acquired property whilst in clerical orders but whilst still under paternal power. A 472AD constitution of the Eastern Emperor Leo states that clerics who are under paternal power are free to alienate their own property acquired whilst in clerical orders by will, by gift or by any other manner.<sup>78</sup> By analogy with the personal wages earned by a Roman soldier (the *peculium castrense*) and later by certain members of the imperial bureaucracy, this specific kind of property held by bishops, presbyters and deacons was not to count as part of the patrimonial estate when the *pater familias* died. This legal ruling, however, apparently gave rise to further familial conflict. A 531AD constitution,<sup>79</sup> issued by Justinian, states that since the law of Leo permitted a bishop or presbyter to make a will disposing of their *peculium quasi castrense*, doubt has arisen as to whether those wills can be subject to a *querela inofficiosi testamenti* (a complaint against an 'undutiful' will, made by close relatives, discussed above). In the 531AD constitution Justinian ruled that such a testament could not be annulled as undutiful. In 546AD, however, he removed the complication as far as bishops were concerned by stating that they were automatically released from paternal power by their ordination, if they were not *sui iuris* already - at the same time as extending the *peculium quasi castrense* to other clerics (subdeacons, readers, singers), with the proviso that their children were now entitled to the 'legitimate portion'.<sup>80</sup> This complex weighing and balancing of familial claims against the interests of extraneous heirs - including but not limited to the institutional church, monastic foundations and other Christian pious causes - is a recurring feature of late Roman imperial legislation. It also, as we shall

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<sup>78</sup> *CI.1.3.33*.

<sup>79</sup> *CI.1.3.49*.

<sup>80</sup> Justinian *Novel* 123.4 and 123.19.

see in Section III, opened up new opportunities for strategic behaviour by monks, clerics and the imperial legislators themselves.

### III. Gift-giving, inheritance and strategic behaviour.

‘By trusts we play with the laws...’.<sup>81</sup>

In 370AD the emperor Valentinian I addressed a letter to the Bishop of Rome, Damasus, and ordered that it was to be read out in the City's churches (*lecta in ecclesiis Romae*).<sup>82</sup> In this letter Valentinian revisited the time-honoured ‘moral crime’, as Champlin phrases it, of *captatio*: inheritance hunting.<sup>83</sup> Valentinian's specific target, however, was protecting widows and young women under guardianship (*pupillae*) from inheritance hunting by Christian ecclesiastics, ex-ecclesiastics and ‘continents’ (namely ascetics and monks). The kinsmen of these women should report such individuals to the imperial authorities and they would be dealt with by the public courts. Valentinian also ruled that henceforth, unless ecclesiastics, ex-ecclesiastics or continents inherited property from these women on the grounds that they were close relatives, they could obtain nothing via gift or last will.<sup>84</sup> The property would instead be appropriated by the imperial fisc. The 370AD constitution also specifically rules out ecclesiastics being able to receive anything via gift or last testament ‘through an interposed person’: property cannot be transferred

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<sup>81</sup> Jerome, *Letter* 52.6. ‘Per fidei commissa legibus inludimus...’

<sup>82</sup> Excerpted at *CTh* 16.2.20.

<sup>83</sup> On ‘inheritance hunting’ as portrayed in the literature of the Late Republic and early Empire see Champlin, *Final Judgments*, 87-102.

<sup>84</sup> Ambrose Bishop of Milan makes a carefully worded protest against this rule in his *Letter* 73.13-14 [Maur. 18.13-14], addressed to the Emperor Valentinian II (384AD) .

'secretly' to a third person with instructions to pass the property on to its intended beneficiary. As we have seen, however, this legal loophole was also a time-honoured (elite) practice: Constantine had tried and failed to stop the practice in 317AD by setting up a specific procedure for denouncing 'secret trusts'.<sup>85</sup> Nor did Valentinian's 370AD constitution end this strategic practice. According to the monk and ascetic Jerome, writing from a hermit's cell in the Palestinian desert in 393AD, whilst idol-worshipping (pagan) priests, mime artists, charioteers and prostitutes could all inherit property, only clerics and monks were forced to get around the law through *fideicommissa*.<sup>86</sup> For Jerome, the use of *fideicommissa* was justified by Christ and the Gospels when it was done by a bishop, acting on behalf of the 'mother church', in order to provide for the poor; but the use of *fideicommissa* was shameful when used by priests to amass private fortunes for themselves.<sup>87</sup> Jerome thus provided a specific moral justification for those ecclesiastics who attempted to circumvent imperial restrictions for the 'right' reasons.

Late Roman emperors also variously curtailed the testamentary rights of Jews, Samaritans, individuals identified as members of named heretical groups and apostates from Christianity. In the case of apostates from Christianity, a series of imperial constitutions excerpted under Book 16, title 7 of the *Theodosian Code* prohibits them from making donations and wills - with certain exceptions for wills that institute their *sui heredes* as heirs. The right to acquire inheritances is also limited

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<sup>85</sup> *CTh* 16.2.27 (given at Milan, 390AD) forbids women who have become 'deaconesses' from drafting secret *fideicommissa* with clerics as beneficiaries, alongside laying down other restrictions. This constitution was repealed in the same year (*CTh* 16.2.28, given at Verona). See also Marcion *Novel* 5 (455AD) and Marjoran *Novel* 6.11

<sup>86</sup> Jerome, *Letter* 52.6, addressed to the monk-cleric Nepotian. 'Pudet dicere sacerdotes idolorum, mimi et aurigae et scorta hereditates capiunt; solis clericis et monachis hoc lege prohibetur...'

<sup>87</sup> Jerome, *Letter* 52.6. 'Per fidei commissa legibus inludimus, et quasi maiora sint imperatorum scita quam Christi, leges timemus, evangelia contemnimus. Sit heres, sed mater filiorum, id est gregis sui, ecclesia, quae illos genuit, nutrit et pavit. Quid nos inserimus inter matrem et liberos? Gloria episcopi est pauperum opibus providere, ignominia omnium sacerdotum est propriis studere divitiis.'



- again, with exceptions where the apostates themselves have been named as the *sui heredes*. An imperial constitution issued in 383AD opened the way for posthumous accusations against Christian apostates who could be shown to have gone over to the 'sacrileges of temples', to the Jewish rites, or to the infamy of the Manichaeans.<sup>88</sup> Any person, for example an aggrieved heir or family member, could posthumously accuse a decedent of apostasy from Christianity and thus challenge his or her last testament, as long as that person had not themselves acquiesced in the apostasy. The accuser had to bring their suit within five years of the testator's death, by analogy with the rule already established for actions against inofficious wills. A later 426AD constitution covers the reverse scenario: if the sons, daughters or grandchildren of Jews and Samaritans convert to Christianity they cannot be disinherited, or passed over in a testament, or left less than what they would have been entitled to had they succeeded on intestacy.<sup>89</sup> In other words, if a converted son, daughter or grandchild brought an action for an undutiful will against their Jewish or Samaritan parent or grandparent they would succeed. Numerous late Roman imperial constitutions restrict the legal capacities of 'heretics' to bequeath and receive inheritances and gifts. Those named include Manichees, Eunomians, Macedonians, Arians, Apollinarians, Phrygians, Priscillianists, Donatists (alongside 'those who profane the holy mysteries by repeating baptism') and Eutychians.<sup>90</sup> The emperors also attempted to regulate the succession to inheritances where a child was born into a heretical sect and had

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<sup>88</sup> *CTh* 16.7.3, given at Padua, 383 AD.

<sup>89</sup> *CTh* 16.8.28, given at Ravenna, 426AD.

<sup>90</sup> See *CTh* 16.5.7 (given at Constantinople, 381 AD); *CTh* 16.5.9 (given at Constantinople, 382 AD); *CTh* 16.5.17-18 (given at Milan and Rome, 389 AD); *CTh* 16.7.4 (given at Concordia, 391 AD); *CTh* 16.5.23 (given at Adrianople, 394AD); *CTh* 16.5.25 (given at Constantinople, 395 AD); *CTh* 16.5.27 (given at Constantinople 395 AD); *CTh* 16.5.36 (given at Constantinople 399 AD); *CTh* 16.5.54 (given at Ravenna, 414); and *CI* 1.5.8 (given at Constantinople, 455 AD).

subsequently become a Christian.<sup>91</sup> With all these various legal enactments we see late Roman legislators themselves engaged in strategic behaviour, attempting to use the Roman law of donation and inheritance as a means of socio-religious control.

Once again, we find 'secret trusts' being outlawed, this time in cases where heretics and adherents of other proscribed sects were the intended beneficiaries.<sup>92</sup> Reading between the lines of these late Roman prohibitions it seems clear that individuals were in fact attempting to circumvent the law by fraudulent schemes: making gifts and legacies over to a third person in order to benefit an adherent of a proscribed sect or effecting fictitious sales. The ingenuity of these strategies should remind us that, for certain 'heretics', stricken with civil disabilities, it was worth spending time and money on dodging the law. Conversely, for some private individuals it also became worth spending time and money in order to prove an accusation of apostasy or heresy against someone else, especially when that accusation could lead to securing the title to an inheritance or gift. As a *Novel* of the emperor Theodosius II laments less than five years after the promulgation of his lawcode: 'Almost nothing is devised for the welfare of the human race which is not converted by the clever plans of men into fraud and malice.'<sup>93</sup>

In the course of the fifth and sixth centuries the Roman rules and regulations concerning who exactly had the civil capacities to do what in relation to gift-giving and inheritance became extremely complicated. Late Roman legislators worked within a legal framework governed by the past, but they were forced to expand that framework into new areas, in order to cover new - Christian - realities.<sup>94</sup> Christian

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<sup>91</sup> *CTh* 16.5.7.2, given at Constantinople, 381 AD.

<sup>92</sup> See further Johnston, *The Roman Law of Trust*, 71-72.

<sup>93</sup> *NTh* 21.2 pr, trans Pharr.

<sup>94</sup> On the problems that could arise in the drafting of wills in favour of ('orthodox') churches and charitable causes see *CJ*.1.3.48.2 (531 AD) and Justinian *Novel* 131.9 (545 AD), with further

clerics and monks had to work within and around that legal system. Institutional Christianity, as we have seen, benefitted from the fact that the Roman law of succession ‘...did not prescribe or allow just one pattern of behaviour, but presented an array of instruments and rules that permitted testators to pursue an almost infinite variety of goals’.<sup>95</sup> One of the goals of late Roman emperors from at least Theodosius II onwards, however, was the exclusive establishment of Christian 'orthodoxy'. It is in this realm that late Roman legislators displayed their greatest legal ingenuity in terms of the rules and regulations governing donations and inheritances.

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discussion in A. Metro, “La legislazione del tardoantico in materia di disposizioni testamentarie in favore dei poveri,” *Atti dell' Accademia Romanistica Costantiniana XVII* (2010): 269-276. According to *CJ* 1.3.40 (524 AD) some churches provided their own legal experts (*defensores ecclesiae*) in order to dictate the last wills and legacies of dying persons to them.

<sup>95</sup> Saller, “Roman Heirship Strategies”, 29.